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13 and Metropolitan Life Insurance Company

14 **IN THE UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

16 Sharon Booth,

17 Plaintiff,

18 vs.

19 AT&T Long-Term Disability Plan; and
20 Metropolitan Life Insurance Company,

21 Defendants.

NO. CIV 05-01249-PHX-SMM

**DEFENDANTS AT&T LONG-
TERM DISABILITY PLAN AND
METROPOLITAN LIFE
INSURANCE COMPANY'S REPLY
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND
RESPONSE IN OPPOSITION TO
PLAINTIFF'S CROSS-MOTION
FOR SUMMARY JUDGMENT**

22 Defendants AT&T Long-Term Disability Plan (the "Plan") and Metropolitan Life
23 Insurance Company ("MetLife"), reply in support of their Motion for Summary Judgment
24 and respond to plaintiff's Cross-Motion for Summary Judgment. MetLife's decision to
25 terminate plaintiff's long term disability benefits under the AT&T Long-Term Disability
Plan ("Plan") should be upheld because MetLife's decision was substantially supported
by the documentation in the Administrative Record. The documentation submitted to
MetLife by plaintiff does not show any functional impairment that would preclude
plaintiff from working at a sedentary work capacity level. Further, six independent

1 consultants reviewed plaintiff's medical information and reached the conclusion that
 2 plaintiff had no functional impairment and/or her functional impairment did not preclude
 3 her from performing a sedentary job. Thus, it cannot be said that MetLife's decision was
 4 without reason, which is what plaintiff must show under an abuse of discretion standard
 5 of review. Defendants' reply in support of their Motion for Summary Judgment and
 6 response to plaintiff's Cross-Motion for Summary Judgment is supported by the attached
 7 Memorandum of Points and Authorities, Defendants' Statement of Facts in Opposition to
 8 Plaintiff's Cross-Motion for Summary Judgment, and the Court's entire file.

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 **I. NO CONFLICT IS PRESENT IN THE PLAN DOCUMENTS TO CHANGE** 11 **THE APPLICABLE STANDARD OF REVIEW BECAUSE THE** 12 **ADMINISTRATIVE SERVICES AGREEMENT IS NOT A PLAN** 13 **DOCUMENT**

14 The Administrative Service Agreement ("ASA") is not a plan document and
 15 cannot be used to change the standard of review. The Summary Plan Description
 ("SPD") clearly identifies what constitutes the plan documents. It states:

16 **Plan Documents**

17 This summary plan description summarizes the key features of the AT&T
 18 Long Term Disability Plan for Occupational Employees. You can find
 19 complete details in the official LTD Plan documents that legally govern the
 20 operation of the LTD Plan. All statements made in this summary plan
 description are subject to the provisions and terms of those documents,
 which include the:

- 21 • Official LTD Plan text
- 22 • Trust agreement
- 23 • Contract provisions that specifically relate to your benefit claim
- 24 • Annual report of Long Term Disability Plan operations, and
- 25 • Descriptions as filed with the U.S. Department of Labor.

1 The LTD Plan documents govern the operation of the Long Term
2 Disability Plan at all times.

3 See Defendants' Amended Statement of Facts ("SOF"), Exh. 2, bates no. ML-Booth
4 0999.

5 A valid delegation of discretionary authority must be made in the ERISA plan
6 itself or in the SPD. *Crider v. Highmark Life Ins. Co.*, 458 F.Supp.2d 487 (W.D. Mich.
7 2006). An ASA cannot be used to delegate discretionary authority or change the standard
8 of review because ASAs are not available for review by plan participants. *See, e.g.*,
9 *Fritcher v. Health Care Service Corp.*, 301 F.3d 811, 817 (8th Cir. 2002) (ASA could not
10 be used to change standard of review because the ASA is not "a 'plan document' for
11 purposes of holding its terms against a plan participant or beneficiary."); *Local 56,*
12 *United Food & Comm. Workers Union v. Campbell Soup Co.*, 898 F.Supp. 1118, 1136
13 (D.N.J. 1995) ("A formal plan document is one which a plan participant could read to
14 determine his or her rights or obligations under the plan."), *citing Curtiss-Wright Corp. v.*
15 *Schoonejongen*, 514 U.S. 73, 83, 115 S.Ct. 1223, 131 L.Ed.2d 94 (1995) (noting that one
16 of ERISA's basic purposes was to afford employees the opportunity to inform
17 themselves, "on examining the plan document," of their rights and obligations under the
18 plan).

19 Plaintiff's reliance on *Banuelos v. Construction Laborers' Trust Funds*, 382 F.3d
20 987 (9th Cir. 2002) is misplaced because plaintiff has not identified any conflict within
21 the LTD plan documents. Since the ASA is not a plan document, it cannot be used to
22 determine the standard of review to be applied to a claim administrator's decision. The
23 SPD clearly identifies what constitutes the Plan documents, and provides notice to plan
24 participants that the claims administrator "shall have sole and complete discretionary
25

1 authority to determine conclusively” any and all questions arising from administration
2 and interpretation of the Plan provisions, to determine all relevant facts, to determine
3 eligibility for benefits, and to determine the amount of benefits payable under the Plan.
4 (SOF ¶ 8; Exh. 2, bates no. ML-Booth 0998). This language clearly bestows complete
5 discretionary authority on MetLife for the administration of claims. Consequently, the
6 abuse of discretion standard applies to the Court’s review of MetLife’s decision to
7 terminate plaintiff’s benefits under the Plan. *See Firestone Tire & Rubber Co.*, 489 U.S.
8 101, 115 (1989); *Abatie v. Health & Life Ins. Co.*, 458 F.3d 955, 965 (9th Cir. 2006).

9 **II. METLIFE’S CLAIM DECISION MUST BE UPHELD BECAUSE IT WAS**
10 **NOT ARBITRARY AND CAPRICIOUS AND IS SUPPORTED BY AMPLE**
11 **EVIDENCE IN THE ADMINISTRATIVE RECORD**

12 An abuse of discretion standard of review is the same deferential standard of
13 review as “arbitrary and capricious.” *Tremain v. Bell Industries, Inc.*, 196 F.3d 970, 975
14 n. 5 (9th Cir. 1999); *Dytrt v. Mountain State Tel. & Tel. Co.*, 921 F.2d 889, 894 (9th Cir.
15 1990). Under this standard of review, the Court must affirm MetLife’s decision to
16 terminate benefits if the decision was based upon a reasonable interpretation of the plan’s
17 terms and if the decision was made in good faith. *Bendixen v. Standard Life Ins. Co.*, 185
18 F.3d 939, 944 (9th Cir. 1999). MetLife’s decision should not be disturbed unless the
19 Court finds its factual findings were “clearly erroneous.” *See Jordan v. Northrop*
20 *Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 879 (9th Cir. 2004) (“in order to be
21 subject to reversal, an administrator’s factual finding that a claimant is not totally
22 disabled must be ‘clearly erroneous.’”); *Jones v. Laborers Health & Welfare Trust Fund*,
23 906 F.2d 480, 482 (9th Cir. 1990) (an ERISA administrator abuses its discretion only if
24 the decision is so “patently arbitrary and unreasonable as to lack foundation in a factual
25 basis”).

1
2 **1. MetLife Carefully Evaluated All Information in the Administrative**
3 **Record**

4 Plaintiff's claim that MetLife ignored credible evidence is unsupported by the
5 Administrative Record. First, MetLife's termination letter and MetLife's appeal decision
6 affirming the decision to terminate LTD benefits establishes that MetLife reviewed all
7 information that was submitted to it. The termination letter dated March 10, 2004 states,
8 "[a]ll available documentation has been carefully reviewed." (*See* Exh. 74). This
9 included the Plan's definition of disability, all of the medical information and
10 documentation submitted by plaintiff, Dr. Tingey's opinions, Dr. Smith's opinions, Dr.
11 Tingey's response to Dr. Smith's opinion, and Dr. Smith's reply to Dr. Tingey's
12 opinions. (SOF ¶¶ 97-98). MetLife's letter to Ms. Booth notifying her that MetLife was
13 upholding its decision to terminate LTD benefits also outlines the documents submitted
14 and reviewed by MetLife and states that MetLife reviewed "Ms. Booth's complete file."
15 (SOF 118; Exh. 78).

16 Second, when defendants discovered that plaintiff had a functional capacity
17 evaluation performed by Theracomp ("Theracomp FCE report") that was not included in
18 its Administrative Record, defendants requested that plaintiff's claim be remanded to the
19 claim administrator to allow MetLife to evaluate this information to assure that plaintiff
20 received a full and fair review of her LTD claim. *See* Defendants' Statement of Facts in
21 Opposition to Plaintiff's Cross-Motion for Summary Judgment ("SSOF"), ¶ 121. On
22 remand, MetLife reassigned the claim to a new analyst for a complete reexamination of
23 plaintiff's claim. In addition, MetLife commissioned three new independent physician
24 consultants to reexamine all of plaintiff's medical records and the Theracomp FCE
25 report. (SSOF ¶ 123). MetLife's reexamination on administrative appeal fully considered

1 the terms of the Plan, the nature of plaintiff's occupation, and all medical information,
2 including the Theracomp FCE report, as reflected in MetLife's final letter to plaintiff
3 dated January 17, 2008. (SSOF ¶ 156, Exh. 82).

4 **2. A Claim Administrator Is Not Required to Give a Treating**
5 **Physician's Opinion Any Special Weight**

6 Plaintiff's treating physician's opinion conflicted with the opinions of six separate
7 independent physician consultants that reviewed plaintiff's medical records. *See* SOF ¶¶
8 109, 116, 177; SSOF ¶¶ 134, 141, 149, 152. Dr. Tingey informed MetLife that plaintiff
9 had a "multitude of symptoms," which included difficulty with low back pain and
10 "possible seizure disorder versus conversion disorder" that made plaintiff "unable to
11 return to work without restrictions." *See* PSOF 196. In contrast, Dr. Grattan and Dr.
12 Babus' reports state that plaintiff had no limitations preventing her from working. (SSOF
13 ¶¶ 141, 149, 154). Drs. Smith, Jares, Marion, and Robbie opined that plaintiff could
14 return to a sedentary job with some work restrictions. *See* SOF ¶¶ 23, 90, 95, 106-117;
15 SSOF ¶¶ 132, 134. MetLife considered Dr. Tingey's opinions as reflected in its letters to
16 plaintiff, but found the independent physician consultants' opinions to be more
17 persuasive as to whether plaintiff had the functional capacity to perform a sedentary job.
18 The fact that MetLife ultimately gave more credit to the opinions of Drs. Smith, Jares,
19 Marion, Robbie, Grattan, and Babus than the opinion rendered by Dr. Tingey does not
20 mean MetLife abused its discretion when terminating benefits. A claims administrator
21 can reject a treating physician's opinion based on other reliable evidence that conflicts
22 with the treating physician's evaluation. *See Black & Decker Disability Plan v. Nord*,
23 538 U.S. 822, 834, 123 S.Ct. 1965, 1972 (2003) ("[C]ourts have no warrant to require
24 administrators automatically to accord special weight to the opinions of a claimant's
25

1 physician; nor may courts impose on plan administrators a discrete burden of explanation
2 when they credit reliable evidence that conflicts with a treating physician's evaluation.");
3 *Jordan*, 370 F.3d at 879 ("[T]reating physician's opinion gets no special weight and can
4 be rejected on the basis of reliable evidence with no discrete burden of explanation.")

5 The independent physician consultants' opinions are based on factual information
6 contained within the Administrative Record. MetLife ultimately gave more credit to the
7 independent physician consultants' opinions than those of plaintiff's treating physician.
8 This was not an abuse of discretion because the issue for determining disability was not
9 whether plaintiff could return to work "without restrictions," but rather whether plaintiff
10 was disabled and unable to work under the terms of the Plan. Plaintiff had a sedentary
11 job. MetLife relied on the opinions of six physician consultants who were board certified
12 in preventative medicine and occupational medicine, neurology, physical medicine and
13 rehabilitation, and pain medicine and pain management. (SOF ¶¶ 23, 106, 111; Exh. 77,
14 ML-Booth 0009, 0016; SSOF ¶¶ 124, 135, 146).¹ Each of the independent physician
15 consultants prepared separate written reports that contain specific information that
16 formed the bases of their opinion that plaintiff could perform a sedentary job. It was not
17 unreasonable for MetLife to rely on the opinions of these six independent consultants
18 (Drs. Smith, Jares, Marion, Robbie, Grattan and Babus) when determining whether
19 plaintiff had the functional capacity to perform a sedentary job. The consultants were
20 specialists in their fields of practice. Based on the physicians' detailed opinions
21 containing specific references to plaintiff's medical records, MetLife ultimately gave

22 ¹ "The ABCs of Medical Degrees" published by MidMichigan Health states "Board
23 certification indicates that the physician has attained a high level of expertise in their
24 specialty. Passing the certification examination confers the status of Diplomat (indicated
25 by the abbreviation Dipl.)." This Pamphlet is available for viewing at http://www.midmichigan.org/contentstore/The_ABCs_of_Medical_Degrees.pdf.

1 more credit to the six independent consultants' opinions than to plaintiff's primary care
2 physician. It is well settled that when there is relevant evidence in the administrative
3 record that reasonable minds can accept as adequate to support a conclusion, the
4 administrator's decision must be allowed to control, even if it is possible to draw two
5 inconsistent conclusions from the evidence. *Taft v. The Equitable Life Assurance*
6 *Society*, 9 F.3d 1469, 1473 (9th Cir. 1994); *see also, LaPrease v. UNUM Life Ins. Co. of*
7 *America*, 347 F.Supp.2d 944 954 (W.D. Wash. 2004); *Beamish v. The Hartford*, 487
8 F.Supp.2d 1196, 1202 (W.D. Wash. 2007).

9 **3. Plaintiff's Medical Records Show Plaintiff's Condition Had Stabilized**
10 **and Improved Before LTD Benefits Were Terminated**

11 Plaintiff's claim that MetLife improperly terminated benefits without evidence of
12 a change in plaintiff's condition has no merit. While the Ninth Circuit has not directly
13 addressed the issue of whether a plan administrator is required to produce evidence of
14 medical improvement before disability benefits may be discontinued, the Fifth Circuit has
15 stated that a plan fiduciary is not required to obtain proof of a substantial change in a
16 recipient's medical condition after the initial determination of eligibility. *Ellis v. Liberty*
17 *Life Assurance Co.*, 394 F.3d 262, 274 (5th Cir. 2004), *see also, Lawrence v. Motorola,*
18 *Inc.*, 2006 WL 2460921 (D. Ariz. 2006) ("it is not the case that every time a plan
19 administrator discontinues disability benefits, it must produce evidence of medical
20 improvement.")

21 Here, plaintiff's initial determination of eligibility for LTD benefits was made
22 following a surgical microdiscectomy while plaintiff was experiencing continued back
23 pain that was radiating to her buttocks. *See* SOF ¶¶ 24-27. Plaintiff received LTD
24 benefits while she was recovering from a second back surgery and while receiving

1 diagnostic testing for a "seizure" disorder and for syncopal episodes. When plaintiff's
2 diagnostic tests were completed, MetLife evaluated whether plaintiff continued to be
3 disabled under the Plan and found she no longer qualified for disability benefits because
4 the medical tests were essentially normal and multiple physicians reported plaintiff had
5 the functional capacity to perform a sedentary job.

6 Moreover, the Administrative Record shows that plaintiff's condition had, in fact,
7 improved over time. Dr. Robbie's report noted plaintiff's medical records showed she
8 had normal strength, sensations, gait and coordination in her lower extremities; she had
9 no muscle atrophy; she was able to toe walk and heel walk without any difficulty; and
10 she was able to squat and rise without difficulty. (SSOF ¶ 128). Likewise, Dr. Grattan
11 and Dr. Babus' reports noted that plaintiffs' neurologic examinations were essentially
12 normal with no evidence of decreased power or atrophy, decreased coordination,
13 decreased sensation, abnormal reflexes or abnormal tests that would necessitate
14 restrictions or limitations in work activity. (SSOF ¶¶ 142, 150).

15 Dr. Tingey informed MetLife that plaintiff's pain had stabilized. (SOF ¶ 94). By
16 October 2003, plaintiff had completed a thorough cardiology work up for her syncopal
17 episodes, which included an implantation of a loop recorder, and plaintiff's cardiologist
18 concluded there were no arrhythmias to correspond to plaintiff's seizure-like activity.
19 (SOF ¶¶ 51 66-68, 75, 89). Plaintiff also had several neurological exams, which were
20 found to be normal, and Dr. Merkel's records (plaintiff's treating pain management
21 physician) also showed improvement. In this regard, Dr. Merkel's records show
22 plaintiff's MS Contin was steadily decreased with no reported discomfort, except for
23 some complaints of tenderness over her lumbar paraspinal muscles. (SOF ¶¶ 72, 76, 81).

1 Pain that is reduced from radiating pain down to muscle tenderness on physical
2 examination is clear evidence of significant improvement.

3 **4. The Relevant Date For Evaluating Whether Plaintiff Was Disabled is**
4 **the Date LTD Benefits Were Terminated**

5 Plaintiff's focus on her condition while she was having her back surgeries and
6 while she was undergoing diagnostic testing is irrelevant. The fact that MetLife found
7 plaintiff to be disabled in 2002 does not require a finding of continuing disability in 2004.
8 The relevant time frame for determining whether MetLife abused its discretion in
9 determining plaintiff was no longer disabled was plaintiff's condition in March 2004,
10 when MetLife terminated plaintiff's LTD benefits. At that time, plaintiff's diagnostic
11 procedures had been completed, and her tests did not reveal any significant cardiac or
12 neurological abnormalities to account for plaintiff's subjective accounts of back pain and
13 "seizures." (SOF ¶¶ 63, 65, 66-68, 73, 89). Plaintiff's cardiology work up and
14 neurological examinations were essentially normal. *Id.* Plaintiff was still taking narcotic
15 medication, but her records revealed that she was mobile, she independently performed
16 her activities of daily living, and she walked her dog four times a day. (SOF ¶¶ 70, 77).

17 Moreover, MetLife specifically inquired whether plaintiff's medications could
18 cause functional impairment as of March 1, 2004. Dr. Robbie concluded that plaintiff's
19 medications did not cause functional impairment because there was no documentation in
20 the medical records that plaintiff's medications impaired plaintiff's cognition, memory or
21 attention. (SSOF ¶ 133). Dr. Grattan concluded that plaintiff's clinical picture did not
22 reflect excessive sedation from opioids or safety concerns from opioids. (SSOF ¶ 145).
23 Dr. Babus, a pain medicine and pain management specialist, also concluded that
24 plaintiff's medications did not cause any functional impairment or safety risk because

1 there was no documentation plaintiff had any psychological effects, memory loss or side
2 effects from medications that would prevent her from returning to work. (SSOF ¶ 154).

3 MetLife did not abuse its discretion when looking for medical verification whether
4 plaintiff had the functional capacity to perform a sedentary job because this was not
5 MetLife's sole consideration in rendering its decision. MetLife examined plaintiff's
6 diagnoses, her job duties, the treating physicians' physical examinations and assessments,
7 and the opinions of its independent physician consultants. Dr. Jennifer Bortz, a
8 neuropsychologist, noted plaintiff's neuropsychological testing was unreliable due to
9 considerable psychiatric overlay, and Dr. Bortz believed aspects of plaintiff's pain
10 disorder reflected somatization tendencies. (SOF ¶ 62). Dr. Jares and Dr. Robbie, who
11 are both board certified neurologists, confirmed that plaintiff's repeated neurologic
12 examinations only showed mild deficits,² plaintiff had no pathology to account for her
13 degree of pain, and plaintiff's physical impairments did not prevent her from performing
14 a sedentary job. (SOF ¶ 109; Exh. 77; SSOF ¶¶ 128-130, 134). Dr. Marion noted plaintiff
15 had normal strength, sensation and reflexes, she could ambulate independently, and she
16 could conduct all of her activities of daily living. (SOF ¶ 115). Drs. Robbie, Grattan, and
17 Babus similarly concluded that plaintiff did not have any significant findings of physical
18 disability, and her neurological exams were essentially normal. (SSOF ¶¶ 128, 142, 150).
19 Dr. Jares noted plaintiff should be restricted from working at heights, using safety
20 sensitive machinery, and driving a motor vehicle. (SOF ¶ 110). Drs. Grattan and Babus
21 on the other hand concluded plaintiff's medical information did not support a functional
22 limitation. (SSOF ¶¶ 141, 149, 154). MetLife considered all of these factors when

23 ² Dr Jares noted these deficits consisted of mildly positive straight leg raising,
24 lumbosacral paraspinal muscle tenderness, reduced range of motion of the lumbar spine,
25 a reduced ankle reflex, and reduced sensations in the left lower extremity. *See* Ex. 77.

1 making its decision, not just the consultants' opinions. The evidence submitted in
2 support of plaintiff's LTD claim did not establish that plaintiff's medical condition was of
3 a severity that prevented her from performing the duties of a sedentary job. *See Jordan*,
4 370 F.3d at 880 (noting a medical diagnosis does not by itself establish disability
5 preventing a person from working).

6 MetLife ultimately found the weight of the evidence, including the opinions of
7 Drs. Smith, Jares, Marion, Robbie, Grattan, and Babus, outweighed Dr. Tingey's
8 opinions. The independent physician consultants' reports contain specific reasons why
9 the consultants believed plaintiff was able to perform a sedentary job that are based on
10 specific information contained in plaintiff's medical records and the Theracomp FCE
11 report. MetLife's acceptance of the consultants' opinions over the opinions of Dr.
12 Tingey and the occupational therapist who conducted the FCE is not evidence that
13 MetLife acted arbitrarily. *See Jordan*, 370 F.3d at 880. A plan administrator does not
14 abuse its discretion merely because there is evidence in the Administrative Record that
15 could have supported an opposite decision. *See Taft*, 9 F.3d at 1473-1474.

16 **5. Plaintiff's Diagnosis of "Conversion Disorder" Does Not Support a**
17 **Finding of Disability**

18 Plaintiff's diagnosis of "conversion disorder" cannot serve as a basis of disability.
19 The Plan requires that a participant be under a physician's care and following a
20 recommended course of treatment to be disabled. (SOF ¶ 10). Plaintiff did not receive
21 psychiatric or psychological treatment for conversion disorder. Back in May 2002, Dr.
22 Bortz, a neuropsychologist, recommended treatment and provided plaintiff with names of
23 therapists for treatment, but plaintiff never followed through to obtain treatment. (SOF ¶¶
24 62, 65, 89, 96; Exh. 45). While Dr. Smith noted MetLife may want to consider an

1 independent examination by a psychiatrist to determine whether plaintiff had a
2 “mental/nervous” disorder, MetLife was not required to obtain any psychiatric evaluation
3 because it was unnecessary. Plaintiff’s disability was based on low back pain. (SOF ¶¶
4 38, 39, 86). Plaintiff was not under the care of a psychiatrist or psychologist, nor was she
5 following a recommended course of treatment for conversion disorder. Consequently,
6 plaintiff cannot be found disabled by this condition under the terms of the Plan because
7 she does not meet the requirements of the Plan for a finding of disability for this
8 condition. *See* SOF ¶ 10.

9
10 **6. MetLife Fully and Fairly Considered The Theracomp Functional
Capacity Examination When Plaintiff’s Claim Was Remanded For
Additional Review**

11 The Court is limited to a review of the Administrative Record when determining
12 whether MetLife abused its discretion when terminating plaintiff’s benefits under the
13 Plan. *Abatie v. Health & Life Ins. Co.*, 458 F.3d 955, 970 (9th Cir. 2006). MetLife did
14 not have a copy of the Theracomp FCE report when plaintiff appealed MetLife’s decision
15 to terminate benefits.³ When defendants discovered that plaintiff had a functional
16 capacity evaluation performed by Theracomp that was purportedly sent to MetLife for its
17 consideration during the appeal process, defendants requested that plaintiff’s claim be
18 remanded to allow MetLife to evaluate this new information and to assure that plaintiff
19 received a full and fair review on administrative appeal. (SSOF ¶ 121).⁴ On remand,
20

21 ³ MetLife acknowledges that plaintiff’s counsel sent it letters stating that plaintiff planned
22 to obtain a functional capacity examination, but the Theracomp report was never received
23 by MetLife nor was it a part of the Administrative Record when MetLife upheld its
decision to terminate benefits and notified plaintiff of its decision in its letter dated
October 21, 2004. *See* SOF 118-120; Exh. 78.

24 ⁴ Defendants produced a copy of the Administrative Record to plaintiff with its Initial
Disclosure Statement on January 4, 2006. Despite knowing for approximately 21 months
25 that the Theracomp FCE report was not a part of the Administrative Record, plaintiff did

1 MetLife reassigned the claim to a new appeal analyst for a complete reexamination of
2 plaintiff's claim. MetLife requested that all of plaintiff's medical information, including
3 the Theracomp FCE report, be examined by a new neurologist, a physical medicine and
4 rehabilitation specialist, and a pain medicine and pain management specialist. (SSOF ¶
5 123). Dr. Robbie, a board certified neurologist, reviewed the Theracomp FCE report and
6 noted that the Theracomp report confirms that plaintiff can perform sedentary to light job
7 functions. (SSOF ¶¶ 124, 129). According to Dr. Robbie, the Theracomp FCE report
8 indicates plaintiff's dexterity movements were average, her gait was slightly slow,
9 balance was normal, she was able to do partial squats, she was able to perform her daily
10 activities without much limitation, she was able to climb, and she was able to lift 18
11 pounds, all of which indicated an ability to perform sedentary to light work. (SSOF ¶
12 130). Dr. Robbie concluded that plaintiff's medical information and the Theracomp FCE
13 report shows that plaintiff retained the ability to perform sedentary to light full time work
14 since March 1, 2004. (SSOF ¶134).

15 Dr. Grattan, board certified in physical medicine and rehabilitation, reached
16 similar conclusions. Dr. Grattan's report noted plaintiff had limited range of motion in
17 the lumbar spine in all directions and the Theracomp FCE report notes subjective
18 limitations to sitting tolerance and upper extremity strength and dexterity that were within
19 normal limits. (SSOF ¶ 140). Dr. Grattan recognized plaintiff had subjective complaints
20 of pain and decreased range of motion secondary to pain. (SSOF ¶ 140). Dr. Grattan also
21 noted that plaintiff's neurologic examinations have remained essentially normal with no

22
23 not alert MetLife or defendants' counsel that the FCE report had been mailed to MetLife
24 for review during her administrative appeal. When defendants became aware of the FCE
25 report upon review of Plaintiff's Cross-Motion for Summary Judgment, defendants
quickly moved for a remand to allow for a review of the report.

1 evidence of decreased power or atrophy, decreased coordination, decreased sensation,
2 abnormal reflexes or abnormal specific tests for diagnoses that would necessitate
3 restrictions or limitations in work activity. (SSOF ¶ 142). According to Dr. Grattan, the
4 Theracomp FCE report stating plaintiff's sitting tolerance was limited was entirely
5 subjective and self-limited. (SSOF ¶ 143). Dr. Grattan further believed it was unlikely
6 that plaintiff gave full maximal effort during the FCE and raised concerns about
7 secondary gain. *Id.* Dr. Grattan concluded that clinical findings did not support a
8 functional limitation and the clinical findings in plaintiff's medical records suggested that
9 plaintiff could perform at much higher level than what was seen on the FCE. (SSOF ¶¶
10 140, 144).

11 Dr. Babus, a specialist in pain medicine and pain management, noted that the FCE
12 report, by itself, was invalid due to lack of documentation. (SSOF ¶ 152). Dr. Babus
13 noted the Theracomp FCE report had no documentation, either by physical findings or
14 pathology, to support the conclusion that plaintiff could not do sedentary work due to an
15 inability to sit for long periods of time. *Id.* Dr. Babus noted that plaintiff's reported pain
16 was inconsistent with the clinical findings as well as the MRI, CAT scans, and the EMGs
17 that showed no real pathological findings. (SSOF ¶ 152). Moreover, Dr. Babus noted
18 plaintiff's medical information lacked any pain diaries or quantitative analysis of
19 plaintiff's pain, in percentage or VAS scores, to support an inability to do sedentary
20 work. (SSOF ¶ 151). Dr. Babus concluded that plaintiff had no functional limitations
21 from a pain standpoint that impeded her ability to return to work. (SSOF ¶ 149).
22 Consequently, any errors during the first administrative review were corrected on remand
23 and upon MetLife's complete reexamination of the Administrative Record using a new
24 appeals analyst and independent physician consultants. The supplement to the

1 Administrative Record establishes that the Theracomp FCE report was fully reviewed on
2 remand and MetLife's decision that plaintiff has retained functional capacity to perform a
3 sedentary job is justified on factual information within the Administrative Record.

4 **III. CONCLUSION**

5 The Administrative Record contains a reasonable basis for MetLife's
6 determination that plaintiff's medical condition did not cause functional limitations of a
7 severity that plaintiff was disabled under the terms of the Plan. MetLife considered all of
8 the information that was submitted to it and came to a reasonable conclusion that
9 plaintiff's medical condition does not prevent her from performing a sedentary job. Each
10 of the independent consulting physicians retained by MetLife performed an extensive
11 review and analysis of plaintiff's medical information and concluded that there was no
12 medical information or tests in plaintiff's file showing plaintiff lacked the functional
13 capacity to perform a sedentary job. The consultants were specialists in neurology,
14 physical medicine and rehabilitation, and pain medicine and pain management. MetLife
15 weighed these opinions with plaintiff's self reports of back pain and information
16 contained in the medical records, including the information in the Theracomp FCE report,
17 and determined that plaintiff was no longer able to establish that she was disabled under
18 the terms of the Plan. Because the factual predicate for MetLife's determination that
19 plaintiff was not disabled under the terms of the Plan is within the Administrative Record
20 and the basis of MetLife's decision was fully explained to plaintiff, Defendants' Motion
21 for Summary Judgment should be granted and plaintiff's Cross-Motion for Summary
22 Judgment should be denied.

23 ...

24 ...

1 DATED this 29th day of February, 2008.

2 **KUNZ PLITT HYLAND**
3 **DEMLONG & KLEIFIELD**
4 A Professional Corporation

5 By s/Timothy R. Hyland
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13 ORIGINAL of the foregoing e-filed
14 this 29th day of February, 2008, with:

15 Clerk
16 United States District Court
17 District of Arizona
18 401 West Washington
19 Phoenix, Arizona 85003

20 and a COPY hand-delivered this same date to:

21 Honorable Stephen M. McNamee
22 United States District Court of Arizona
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